LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAY 8 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 1089

ARCHIE K. BABSON, *Petitioner*

vs.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JAMES W. HEYER,
Suite 1102,
1700 Broadway,
Denver 2, Colorado,
Counsel for Petitioner

PEERLESS PRINTING CO., 1959 BROADWAY, DENVER 2, COLORADO

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No.

ARCHIE K. BABSON, *Petitioner*

vs.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPINION BELOW

The opinion of the Court of Appeals is not yet reported. A copy of the opinion filed is set forth in Appendix A, *infra* pp. i-viii.

JURISDICTION

The judgment of the Court of Appeals was entered on April 8, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

I.

Should this Court sanction the departure by a trial judge from the mandate of Rule 30, Federal Rules of Criminal Procedure, where his failure to instruct the jury after arguments of counsel may have prejudiced the accused?

II.

Did the trial court's refusal to admonish the jury that

the supplemental instructions given should be considered only in relation to all instructions previously given, constitute error of sufficient magnitude to warrant a reversal of the conviction?

RULE OF CRIMINAL PROCEDURE INVOLVED

Rule 30 of the Federal Rules of Criminal Procedure, Title 18 U.S.C., provides as follows:

> "At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, *but the court shall instruct the jury after the arguments are completed.* No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury." (Emphasis supplied.)

STATEMENT OF THE CASE

After a jury trial in the United States District Court for the Northern District of California, Southern Division, petitioner was convicted on one count of conspiracy to violate 18 U.S.C. 371, and twenty additional substantive counts of mail fraud in violation of 18 U.S.C. 1341. He was sentenced under 18 U.S.C. 4208(a) to imprisonment for a total of seven years. Appeal was taken to the Court of Appeals for the Ninth Circuit under the jurisdiction granted that Court by 28 U.S.C. 1291; and after review, the judgment and conviction was affirmed. (App. B, *infra*, p. ix).

The trial judge instructed the jury on the law of the case *prior to* the summations by counsel (Reporter's Transcript pp. 1655-1678). The evidence was concluded at about 12:20 P.M. on October 1, 1962 (R. T. 1654), and the trial judge delivered his instructions to the jury following the

noon recess. On the following morning summations by counsel were delivered, after which the judge gave a closing instruction explaining the forms of verdict, and the jury retired to deliberate at approximately 2 o'clock P.M. on, October 2, 1962.

Seven and one-half hours after deliberations had begun, the jury foreman requested the court to repeat instructions on the law pertaining to conspiracy (R. T. 1688). In response to this request, the court gave certain instructions on "aider and abettor" and repeated those previously given on the law of conspiracy (R. T. 1689-1696). However, the court refused to instruct again upon "reasonable doubt" and other principles favorable to the defendants although specifically requested to do so, nor did he grant the equivalent by charging the jurors to consider the additional instructions only in relation to all others originally given. These supplemental instructions were given approximately 32 hours after the original charge was delivered.

The decision of the appellate court relating to the questions presented here commences on page 7 of the opinion (Appendix A, p. vii). The Court of Appeals was unable to understand why the trial judge chose to ignore Rule 30, and stated that where supplemental instructions are given, the better practice undoubtedly is for the judge to expressly advise the jury to consider such instructions only as a part of and equally with the entire charge originally given. The opinion holds that the trial court committed clear error in both instances, but that such departures from established procedure and practice were not of sufficient magnitude to warrant a reversal of the judgment.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

I.

The Court of Appeals has so far sanctioned a departure by the lower court from the accepted and usual course of judicial proceedings, so as to call for an exercise of this Court's power of supervision.

The purpose of Rule 30 is to give the trial court the opportunity to present the case to the jury with complete

fairness to the parties and after full consideration of their claims as to their theories, the law, and the facts applicable. *Marson v. United States*, 203 F. 2d 904 (C.A. 6). Moreover, the rule directs that the law of the case shall remain first and foremost in the minds of the jurors, and the last words heard by them should be the impartial charge of the judge rather than the impassioned pleas of counsel.

The Ninth Circuit has expressed its view concerning the need for strict compliance with the provisions of Rule 30. *Enriquez v. United States*, 188 F. 2d 313 (C.A. 9). In that case the appellant had failed to observe Rule 30 because although he had voiced objection to a proposed instruction, he did not repeat his objections nor request any limitation on the applicability of the instruction after it was given by the court. The court stated at page 316:

> "Rule 30 is not designed as a mere trap for the unwary. Painstaking compliance with its requirements although not an easy matter for the lawyer is of the very essence of the orderly administration of criminal justice."

Such standard of compliance is perhaps even more difficult for the trial judge, but in the best interests of the orderly administration of justice the standard cannot be lowered. "Rule 30 is clear and unambiguous and its application is not dependent upon the personal whims of the court . . . This rule which has the force of law leaves no area in which it may be disregarded. . . . " *Herzog v. United States*, 226 F. 2d 561, 569 (C.A. 9).

The departure in this case from the normal and accepted course of procedure was not only plain error, but due to the interval of time which elapsed between the giving of instructions and commencement of deliberations (almost 24 hours), the danger of substantial and prejudicial error was present. This case illustrates the need for strict compliance with Rule 30. Where the instructions were followed by a lengthy interval and arguments of counsel, the fundamental principles of the case, including those favorable to the accused, were by then so remote in the minds of the jurors that confusion was bound to result.

The Court of Appeals has noted this error, but by permitting the conviction to stand has thus sanctioned the same. Unless this Court exercises its power of supervision, each trial judge may with impunity depart from the standard of compliance intended by Rule 30, as his discretion or "personal whim" may dictate.

II.

The decision of the Court of Appeals with respect to the question of supplemental instructions is in conflict with the decisions of other circuits, so as to merit consideration and review by this Court.

The trial court instructed twice on the law of conspiracy but refused to repeat other instructions favorable to the accused, although specifically requested to do so; and the court made no reference to the duty of jurors to consider as an entirety the additional instructions with those originally given.

"When supplemental instructions are given to encourage an agreement among jurors or on some other matter of procedure, it is not necessary to repeat all instructions or to restate the law on presumption of innocence, burden of proof, and reasonable doubt. However, where the court within its discretion undertakes to give supplemental instructions, the jurors must not be permitted to single out one instruction as stating the law; they must be admonished to consider all instructions as a whole. Where a statute or a point of law favorable to the government is repeated, the trial court should review instructions as to the burden upon the government, or at least grant the equivalent by making reference to and instructing the jurors to be guided by all instructions originally given. *Bland v. United States*, 299 F. 2d 105 (C.A. 5); *Berger v. United States*, 92 F. 2d 438 (C.A. 10); *Speak v. United States*, 151 F. 2d 562 (C.A. 10).

It would not be error to omit repeating the principles favorable to the defendant where counsel assented to the procedure or where no objection was made to the limited instructions given. However in this case, we submit that it was error to refuse the request of defense counsel to

repeat certain instructions favorable to appellant, or to at least grant the equivalent by cautioning the jury to consider the additional instructions only in relation to all instructions previously given.

The prejudice to the accused is apparent since the original instructions had been given many hours earlier on the previous day and were obviously not fresh in the minds of the jurors. If their memory needed refreshing as to the meaning of a conspiracy, it can be fairly inferred that the significance of other instructions explaining the requirements of proof and defining "reasonable doubt" and "presumption of innocence" had also by then eluded the minds of the jurors.

Although the Court of Appeals here acknowledged the trial court's limited instructions to be clear error, the court has, by affirming this judgment, approved a procedure which conflicts with the rule of law followed in the Fifth and Tenth Circuits.

CONCLUSION

The petition for a Writ of Certiorari should be granted.

Respectfully submitted,

JAMES W. FEYER,
Suite 1102,
1700 Broadway,
Denver 2, Colorado,
Counsel for Petitioner

APPENDIX A

United States Court of Appeals
for the Ninth District

ARCHIE K. BABSON and VICTOR J. TRIAL,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

No. 18,410

(Apr. 8, 1964)

Appeal from the United States District Court
for the Northern District of California
Southern Division

Before: MERRILL, KOELSCH and BROWNING, Circuit Judges.

KOELSCH, Circuit Judge.

Archie K. Babson and Victor J. Trial were indicted (with several others) for using the mails to defraud and for conspiracy to do so. 18 U.S.C. §§ 1341, 371. The indictment contained a total of 21 counts; the first charged the defendants with a conspiracy and the remaining 20 charged them jointly with the commission of as many substantive offenses. Four of the substantive counts were dismissed on the Government's motion. The jury found Babson guilty on all remaining counts and Trial guilty of the conspiracy and two of the substantive counts, but not guilty as to any of the others. Both defendants appealed.

The fraudulent acts and the conspiracy charged against these defendants were in pursuance of the business of the United Jet Training Schools, which purportedly was to train persons for positions of responsibility with makers of jet airplane engines and with airlines.[1] In substance, the

[1] The so-called school was also advertised variously as "United Jet Institute" and "United Jet Schools, Incorporated"; in this opinion it will be referred to simply as "The School."

fraudulent scheme alleged in the indictment consisted of a plan to sell, by means of false promises and representation, courses of study which the school offered covering the subjects of jet engine construction and maintenance.

On appeal both defendants commonly contend that the evidence is insufficient to sustain the verdicts. More particularly, they urge that there is no substantial proof (a) of any false representation, (b) of scienter, or (c) of a conspiracy. In addition, Trial, citing *United States v. Corlin*, 44 F. Supp. 940 (D.C.S.D. Cal. 1942), (see also *Kotteakos v. United States*, 328 U.S. 750 (1946) and *Isaacs v. United States*, 301 F.2d 706, 713 (8th Cir. 1962), *Cert. Den.* 371 U.S. 818), argues that if the evidence failed to show the existence of a conspiracy, the judgment on the substantive counts must also be reversed because the indictment charged the defendants jointly, and not jointly and severally, with devising a single fraudulent scheme, and thus there is a fatal variance between the indictment and the proof.

However, a review of the record satisfies us that none of these contentions has merit. When the evidence is viewed in a light most favorable to the prosecution, and all conflicts in it are resolved against the defendants, the fact of their guilt as found by the jury becomes clearly evident. See *United States v. Frago*, 283 F.2d 773 (2d Cir. 1960); *United States v. Mortimer*, 118 F.2d 266 (2d Cir. 1941); *Reistrotter v. United States*, 258 F.2d 379, 395 (8th Cir. 1958); *Galantas v. United States*, 80 F.2d 15, 24 (8th Cir. 1935).

Babson started the school sometime in February, 1956, upon hearing of the need in the then fledgling jet aircraft industry for skilled mechanics and technicians. He had previously promoted a correspondence course in practical nursing and concluded that he could follow the same pattern in this new and lucrative field. He rented an office, hired one Porter to prepare a course for him, and immediately launched an intensive selling campaign, in which he took a dominant role. He wrote and caused to be distributed by mail, and otherwise, a vast number of pamphlets, post cards and circulars, that were used to advertise the school. Some

of the statements appearing in this printed matter were that the school was recognized and its training course was approved by major airlines and makers of jet engines; that upon successfully completing one of the courses a student became a qualified jet specialist or expert technician, and could reasonably expect to secure a position paying an annual salary of from $8,000 to $15,000; and that many graduates had done so. But there was evidence that these representations were untrue. For example, a representative of United Air Lines, one of the world's major commercial carriers by air, testified that the school had no standing with his company and that a graduate of the school at best would be hired as an apprentice mechanic at a pay rate of $2.25 per hour; that United's training program for jet mechanics extended over a four-year period and included not only academic study but actual shop work on the engines, under the supervision of experts, and that five years of such training was required for a supervisory position. Another witness, speaking for the Allison Division of General Motors, a principal maker of jet engines, gave testimony to the same effect. Likewise, it appeared that the Civil Aeronautics Administration of the Federal Government, whose function it is to certify schools for airplane mechanics, required as a minimum for such certification that the school offer a course of 300 hours' actual engine work, and 1200 hours of study, and that Babson had been so informed. In addition, there were no graduates of the school when the statements first appeared and several of those who later completed a course, testified that their diplomas were no help to them when looking for a job.

Babson also recruited a crew of salesmen whose function it was to visit prospects and secure their applications for enrollment. He conducted sales meetings at which he lectured the salesmen on sales methods, and assembled in a "sales list" a selected lot of printed literature, including many of his own writings.

The vigor of the sales program, the attractiveness of what was offered, and the manner in which it was offered, is attested by the fact that some 1400 courses were sold. However, since anyone was eligible to apply for enrollment,

without regard to the necessity of any basic qualifications. Solicitation was indiscriminate and, while Babson testified that the policy of the school was to carefully screen applicants, the practice was clearly otherwise and very few were rejected.[1] With few exceptions, anyone with a "down payment" was acceptable as a student, and even the amount of such payment was as variable as the prospect's purse, ranging from $5.00 to several hundred dollars.

Trial had been acquainted with Babson for some time before the latter started the school. He was hired as a salesman in August, 1956, and actively engaged in that work until April, 1957, when he left to set up a correspondence school of his own. During this nine-month period he interviewed numerous prospects and succeeded in selling nearly 625 of the courses; his buyers included a greens' keeper for a golf course, an apprentice bricklayer, a restaurant owner, and a sausage packer; and in the process of making the sales, he used this sales list and repeated, with some variations and additions of his own, many of the statements regarding the school that we have paraphrased earlier in this opinion.

Babson was no doubt entitled to some latitude in extolling the merits of his school, but this did not permit him to make representations concerning the school that were untrue, or with a reckless indifference as to whether they were true or false. *West v. United States*, 68 F.2d 96, 98 (10th Cir. 1933); *United States v. Murdock*, 290 U.S. 389, 394-395 (1933). Yet, considering his position as founder and managing head of the school, it is apparent from the very nature of the representations that we have paraphrased that he did so.

The evidence relevant to Trial, although not as extensive or direct as that in the case against Babson, is likewise sufficient to support the finding of his guilt on the substantive counts. Trial, as has been mentioned earlier in this opinion, advised numerous prospective customers, including the two named in the substantive charges of which he was convicted, that the courses offered by the school

[1] One notable instance was a policeman.

were stepping-stones to well paid positions as supervisors of jet mechanics and specialists, and that persons who completed the courses would gain knowledge sufficient to qualify for such positions. These statements were part of his regular sales talk and were consistently made. Not only was the jury entitled to conclude that, in no event could a course produce the results claimed for it but even aside from that fact, no person, unless he was extraordinarily naive or deliberately blinded himself to reality, would honestly believe that those whose occupations were that of common laborers, or who possessed little or no formal education—and Trial made these assurances to such people—could be so speedily and easily transformed into skilled technicians. Certainly Trial was not so unsophisticated that the jury was obliged to determine that he made these representations in good faith, for he was a mature man with a college degree in architecture and some engineering experience; his employment had included a job with Pratt & Whitney, makers of airplane engines, in its small tool division. In sum, we are fully satisfied that Trial cannot be regarded as a credulous salesman who innocently reiterated fraudulent representations prescribed by his superior.

Defendants' attack on the evidence relating to conspiracy is adequately disposed of, adversely to them, by the following apt quotations:

> "When a scheme to defraud is shared by two or more it becomes a conspiracy; the rules of evidence are the same as where a conspiracy is charged (Robinson v. United States, 9 Cir., 33 F.2d 238); and the act of each party in furthering the common scheme is the act of all. Davis v. United States, 5 Cir., 12 F.2d 253. If one's intent is to defraud when he joins a dishonest scheme, he becomes a part of the scheme, although he may know nothing but his own share in the aggregate wrongdoing. Silkworth v. United States, 2 Cir., 10 F.2d 711. Formal agreement is not necessary, it being sufficient if there is an association in the purpose to defraud." Blue v. United States, 138 F.2d 351, 358 (6 Cir. 1943).

In speaking of the culpability of a salesman similarly circumstanced as Trial, the Eighth Circuit declared:

> "If believed, it (i.e., the evidence) established that the gist of the scheme to defraud was brought to his knowledge and that he joined in with the principal schemers to accomplish their purposes. It is not necessary for the government to prove that he was one of those who originally devised the scheme. When he joined in the selling and the misrepresentations and deceptions, although in comparatively few instances, he brought himself within the provisions of the statute." Reistgoffer v. United States, 58 F.2d 379, 395 (8th Cir. 1958).

The next assignment of error is grounded on the premise that the trial judge permitted the jury to publicly deliberate on its verdict. We are of course aware of the rule that a juror should not be subjected to "extraneous influences" which do or might in any degree coerce, embarrass, or otherwise hamper him in fulfilling his function as a judge of the evidence and finder of fact. A juror must be insulated against influences and protected from pressures that would tend to fetter him in the free exercise of his own judgment. *Remmer v. United States*, 350 U.S. 377 (1956); *Southern Pacific Co. v. Klinge*, 65 F. 2d 85 (10th Cir. 1933). To this end the law requires that all deliberations by a jury must be conducted in the utmost privacy. *People v. Knapp*, 42 Mich. 267, 3 N.W. 927; *Crockett v. State*, 52 Wis. 211, 8 N.W. 603; *People v. Bruneman*, 4 Cal. App. 2d 75, 40 P.2d 891 (1935); *Gainey v. People*, 97 Ill. 270; *Boicman v. State*, 207 Ind. 358, 192 N.E. 755; *State v. Aker*, 54 Wash. 342, 103 Pac. 420. There is a considerable difference of judicial opinion whether a showing that a jury was intruded upon requires the granting of a new trial (*People v. Knapp, supra*), or merely gives rise to a presumption of prejudice which the prosecution may rebut (*Graves v. Territory*, 16 Okla. 538, 86 Pac. 521; *Crockett v. State, supra*). From what was said in *Remmer* we would be inclined to say the latter view was the one to follow. But on this record the question is purely abstract and requires no expression of opinion. What occurred was that the jury, after the cause was submitted and following some seven

hours of deliberation, requested to be and was returned into open court for additional instructions relating to the law of conspiracy. Upon answering the foreman's inquiry, the trial judge asked: "Now, is there anything further that you wish? You can confer among yourselves rather informally there, (that is, in the jury box)." To counsel's objection that such a discussion would constitute public deliberation, the judge replied: "They are conferring informally among themselves to see whether or not there is anything further they wish to ask the court." The jury was properly in the courtroom (*Ellis v. United States*, 155 U.S. 117 (1894)) and we perceive nothing in what it did that amounted to deliberation of the kind that must be conducted in private.

The remaining points are based upon the trial court's action in instructing the jury prior to the arguments, contrary to Rule 30 of the Federal Rules of Criminal Procedure. The contention is that such a departure from the rule, although not objected to below, was so prejudicial as to constitute "plain error" within the purview of Rule 52(b) of said Rules. Further, it is urged that, even though that error alone did not operate to deprive the accused of a fair trial, the fact that additional instructions were given cooperated to do so. The burden of the argument is that the jury probably forgot the earlier instructions because (1) they were followed by the argument, and (2) the supplemental instructions probably led the jury to view as superseded those given earlier. We are unable to understand why the trial judge chose to ignore Rule 30, and certainly do not sanction that irregular procedure. It is essential to the administration of justice that a jury scrupulously follow the law as given to it by the judge, and to that end his instructions should be clear and firmly fixed in the mind of each juror. And if supplemental instructions are given, the better practice undoubtedly is for the judge to expressly advise the jury that such instructions constitute only a part of the entire charge, and must be considered equally with the earlier ones. Here he refused to do this. In both instances the trial judge clearly erred, but in neither was the error of sufficient magnitude to warrant a reversal of the judgment. The most that appears is action pre-

mature by a few hours. And with reference to argument concerning the supplemental instructions, the answer is that they were not such as to create a false impression in the minds of the jurors, as was the instruction in *Bland v. United States*, 309 F.2d 105 (5th Cir. 1962), a case relied upon by appellants, nor did the judge comment on the evidence so as to necessitate his reminding the jury of its fact-finding function (*Berger v. United States*, 62 F.2d 438 (10th Cir. 1932)). Moreover, the colloquy between him and the jury foreman dispels any inference that the jury believed it might or should disregard the earlier instructions.

Finding no reversible error, we affirm the judgment.

APPENDIX B

JUDGMENT

United States Court of Appeals
For the Ninth Circuit

ARCHIE K. BABSON and VICTOR J. TRIAL,
Appellants,

vs.

No. 18410

UNITED STATES OF AMERICA,
Appellee.

APPEAL from the United States District Court for the Northern District of California, Southern Division.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Div., and was duly submitted.

IN CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered April 8, 1964.